IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

Criminal Appeal No.188 of 2001.

1. Jahir Abbas Appasab Bagvan
2. Mubarak Shamsher Ali Khan
3. Bilal Mahommaed Alli Khatib
4. Manvel Fasku D'Souza ..Appellants/
(Original Accused Nos.1 to 4)

Versus

State of Maharashtra ..Respondent

Smt. Varsha Palav for the appellant nos.3 and 4
Smt. Revati Mohite-Dere for Appellant Nos.1 & 2

Dr.F.R.Shaikh, APP for the respondent- State

CORAM: S.B.MHASE &
S.R.SATHE, JJ.

DATE : 28th Sept, 2005

ORAL JUDGMENT (Per S.B.Mhase, J.)

1. This appeal is directed against the Judgment of conviction and sentence imposed by the Sessions Judge, Sindhudurg, Oras, in Sessions Case No.12 of 2002 decided on 21.1.2001. The Appellants/Original accused were held guilty for the offences punishable under Section 302, 201 r/w. 34 of I.P.C. They were sentenced to suffer imprisonment for life and to pay fine of Rs.200/- each i.d. to suffer R.I. for one year under Section 302 r/w. 34 I.P.C. The accused

were further sentenced to suffer R.I. for three years and to pay fine of Rs.1000/- each i.d. to suffer R.I. for three months for the offence punishable under Section 201 r/w.34 of I.P.C. The Appellants/accused were charged under Section 395 r/w.397 of Penal Code, however the Sessions Judge has recorded the finding of acquittal under these two sections.

2. The offence is dated 26.10.1999 committed at about 6.45 to 8.30 p.m. in Amboli Ghat, situated between Sawantwadi and Ajra in Kolhapur district. Shri Javed Khanapuri, the deceased, was the resident of Belgaum and he was a wholesale vegetable dealer. He used to supply vegetables to the retail vegetable dealers situated at Banda, Sawantwadi, Malewad, Shiroda, Vengurla by tempo. At the relevant time, there was strike of tempo and therefore the vegetables were sent by S.T.bus. It was the practice of the deceased that on every Tuesday the deceased used to visit the above referred places for recovery of the prices of vegetables supplied, and used to return by 9.00 O'Clock in the night. It was also his practise that at about 4.00 O'Clock in the afternoon the deceased used to telephone at Belgaum and inform his family members to purchase the vegetables. On 26.10.1999, i.e. on the day of the incident the

deceased had left Belgaum at 6.00 p.m. by S.T.bus and had come to Sawantwadi. Thereafter at 4.30 p.m., the deceased had telephoned to his brother Wahid and told him that he shall purchase the vegetables for the next day and had informed that the recoveries were yet to be completed. Thereafter the deceased is not reported to be alive. According to the Prosecution, the deceased collected the recoveries onwards Sawantwadi by visiting various places and had returned to Sawantwadi again alongwith P.W.7 Mohammed Hudali, who is a betel-nut vendor. Both of them had met each other at Vengurla, and from Vengurla they have returned at about 3.00 to 4.00 O'Clock on 26.10.1999 to Sawantwadi. Thereafter, P.W.7 Mohammed Nisar had gone for his recovery work. The deceased had thereafter visited the shop of accused no.1. P.W.13 states that an amount of Rs.6000/- was paid by accused No.1 and for remaining amount, he asked the deceased to wait. P.W.13 also states that he has paid an amount of Rs.6900/- Thereafter the deceased was seen at about 6.00 p.m. at Gavali Titha by P.W.25 Iqbal and also by P.W.16 Akbarali at 6.30 p.m. in the company of accused No.1. Since the deceased did not return home, his brother on the next day came to Sawantwadi alongwith P.W.7 and others in search of deceased Javed. They went to the house of Bakhtar and made enquiries. While making enquiries it was

disclosed that Javed was in the company of accused Nos.1 to 4 in Amboli Ghat. Since then deceased was not traced and these four persons were also not found, on 27.10.1992 the cousin brother of the deceased Fazal has lodged his Missing Report. Ilyas alongwith others visited the said spot in Amboli Ghat and they found the dead body of the deceased Javed. Thereafter the First Information Report was lodged by P.W.5 Vahid on the basis of which C.R.No.128 of 1999 was registered by the Sawantwadi Police Station under Section 302, 397 r/w.34 of I.P.C., and the crime was investigated, and the chargesheet was filed as against the accused.

3. So far as the death of Javed is concerned, there is no dispute that the death is homicidal. Even the post mortem report shows that there were as many as 18 injuries on the person of the deceased and the cause of death is acute cardio respiratory arrest due to hypo pneumatic haemorrhage shock due to multiple injuries, and therefore, we conclude that the death of Javed Khanapuri was homicidal death.

4. The next question is as to who is responsible for the death. It requires to be stated in the beginning that there is no direct evidence so far as the incident is concerned. The evidence is by way of

circumstantial evidence, and the circumstantial evidence is last seen with the deceased, secondly, the subsequent conduct of the accused persons, thirdly, absconding of the accused for a pretty long period, fourthly, the articles collected from the spot and the discoveries effected at the instance of the accused persons alongwith the Chemical Analyser's Report.

5. The Learned Counsel appearing for the Appelant-accused submitted that there was no motive for committing the offence and that the circumstance on record are not conclusive in nature to the effect that the accused are the culprits. It is further submitted that the evidence of last seen together is not trustworthy to be believed. It is further pointed out that the prosecution has failed to prove the possibility of any other accused being guilty of the offence. The Learned Counsel submitted that the case of the prosecution is based on suspicion and the evidence in respect of discovery and recovery is not reliable to be accepted to pass the conviction.

6. The learned Counsel Shri Shaikh who appears for the State submitted that the prosecution has beyond reasonable doubt established the case that the accused are the only persons who are responsible for the death

of the deceased Javed. The learned Counsel Shri Shaikh further submitted that the evidence in respect of 'last seen together' and the subsequent conduct of the accused persons as also the fact that they were absconding and the discoveries convulsively prove that the accused are the persons who have committed the offence in question and thereby the Sessions Judge has rightly convicted them. In view of these submissions, we desire to scrutinize the evidence of each and every aspect.

LAST SEEN TOGETHER

7. P.W.5 Vahid Khanapuri, who has lodged the First Information Report has stated that on 26.10.1999 deceased Javed had left for Sawantwadi at 6.00 a.m. and there was a phone call from Sawantwadi from Javed at 4.30 p.m. wherein he had disclosed that some recoveries are effected, but less amount is received of the vegetables supplied by S.T.bus and he would return late. However, till 12.00 in the midnight, the deceased did not return home. On the next day also, he waited for arrival of Javed upto 10.00 O'Clock and thereafter he started to make enquiries. He contacted one Mr. Bakkar at Sawantwadi on telephone. However, the said Bakkar reported that he would enquire about

Javed in the market and thereafter let him know. He has further stated that thereafter, he alongwith P.W.7 Ilyas and his brother Sadik and Mustak started for Sawantwadi by car and they reached Sawantwadi at 3.00 p.m. On enquiry about Javed, some four to five persons have disclosed that Javed had left on motorcycle with accused Nos.1 to 4. He further stated that thereafter he made search of the four persons, but they were not found, and therefore, he instructed his cousin brother Fazal to inform the police. His evidence further discloses that on 28.10.1999, his brother Sajid and some other persons went to Goa for search of Javed. He and P.W.7 Ilyas were searching the deceased at Sawantwadi. They went to Amboli GHat. At that time, P.W.7 Ilyas told him that on 26.10.1999, when he was proceeding towards Belgaum, he saw four persons in Amboli Ghat on motorcycle. Therefore, they went to the said spot at Amboli Ghat. At that time, they found a chappal/slipper, and when they went little ahead, they found chilli powder in plastic bag and then they found they dead body of deceasedat about 10 to 15 feet. Thereafter P.W.5 has lodged the First Information Report which is at Exhibit 47. The spot was shown to the police by P.W.7 Ilyas and the spot panchanama was prepared which is at Exhibit 48. According to this witness, there was amount of Rs.76,028/- with the

deceased which he had recovered from the vegetable retailers. It is to be noted that so far as this witness is concerned, this witness is not having any personal knowledge as to who has committed the offence, but on search made by this witness the dead body was recovered and he has lodged the First Information Report. But one circumstance which is to be noted is that he has stated that when he came to Sawantwadi alongwith Ilyas and Sadik, four to five persons had told them that Javed had left on motorcycle with accused Nos.1 to 4. After going through all the evidence on record, we find that prosecution has not made efforts to trace the four to five persons who have given this information to P.W.5 & 7. In fact, the Investigating Officer should have investigated this aspect of the matter and should have traced out the four to five persons who had personal knowledge about seeing the deceased with the accused persons. In the absence of the evidence of this four to five persons, the statement made by P.W.5 that the four to five persons disclosed them that the deceased had left with accused is a hearsay evidence and that cannot be taken into consideration. This witness is not having any other information.

8. It will be seen from the testimony of P.W.6

Fazal Abdul Sattar Khanapuri, who is the cousin brother of the deceased that he has lodged a missing report No.23 of 1999 at 23.30 hours on 27.10.1999. That means P.W.6 was alongwith P.W.5 when P.W.5 came to Sawant wadi on 27.10.1999 in search of deceased Javed and he has lodged the report at the instance of P.W.5. What is to be noted is that from the evidence of P.W.5 it is reflected that after his arrival he got the information that the deceased Javed had left alongwith accused Nos.1 to 4. However, this witness, i.e. P.W.6 when filed the missing report, did not disclose this information to the police. Instead of showing any suspicion as against accused Nos.1 to 4, simply a missing report is filed. His evidence does not take us anywhere so as to come to the conclusion that the accused have committed the offence.

9. The evidence of P.W.7 Ilyas shows that he is doing betel-nut business and like deceased Javed, he is supplying betel-nuts to various places in Sindhudurg District. He has deposed that on 26.10.1999 he had been to Sawantwadi. He came by car while deceased Javed came by bus. P.W.7 was also accompanied with Imam Hussein, Iqbal, Ajay, and Chandu driver. He states that he came to Sawantwadi and the car went to Kudal and he went from Sawantwadi to Vengurla by bus

and collected the amount from vendors at Vengurla. At that time he met the deceased Javed at Vengurla. Then he and the deceased Javed came together from Vengurla to Sawantwadi on motorcycle which was taken by Javed. After arrival at Sawantwadi at 3.00 p.m., Javed went for collection of the amount and he also went for his own collection. He further stated that he completed his recovery and went to Belgaum from Sawantwadi at 7.00 p.m. alongwith Imam Hussein, Iqbal, Ajay and Chandu driver in the car. He states that he saw four persons at a distance of 23 to 24 kms near a water fall at Amboli Ghat in Sawantwadi. There were two motor cycles, one was coming down towards Sawantwadi and the other was going towards Amboli. The person who was proceeding towards Sawantwadi was in a frightened condition and he was to dash their car. They did not wait because it was 7.30 to 8.00 p.m. on 26.10.1999. He has further deposed that on the next day, P.W.5 and his brother made enquiry of Javed and he told them that they were together from Vengurla to Sawantwadi and that he did not know as to where Javed had gone thereafter. Since the whereabouts of Javed were not traced, therefore, he alongwith Sadik, Vahid and Mustak went to Sawantwadi by car. They went to the house of Bakkar, and on inquiry it is again found that the deceased Javed had left alongwith four persons namely, the

accused nos.1 to 4. He gave the names of accused Nos.1, 3 and 4 and stated that the name of fourth person is not being remembered. He has further given the information to P.W.5 that he had seen the motor cyclist who was about to dash his car and hence they should search said place. He further states that he alongwith four to five persons went to Amboli Ghat where he had seen the motorcyclist. They then found a chappal, packet of chilli powder and thereafter they noticed the dead body of Javed. He stated that accused No.4 was the person who was riding the motorcycle and coming towards Sawantwadi. He has admitted in his cross-examination that there was fog in Amboli Ghat in the month of October and the car had to be driven by taking help of the guard stones, due to the thick fog. He has admitted that nothing was visible beyond two to three feet and there was fog by the side of the road and hence everything was invisible due to fog. He has further admitted that he has not given the description of the four persons before the police and there was no Identification parade held of the said four persons. If these admissions in the cross-examination are taken into consideration, it will have to be concluded that the identification parade of accused no.4, which he has made as the person seen in Amboli Ghat, is of no consequence, and it cannot be accepted. It is

difficult to believe that when there was fog in Amboli Ghat and even driving was not possible without the help of guard stones, he had seen the said four persons in Amboli Ghat. Therefore, his evidence in that behalf is not acceptable. It is further to be noted that like P.W.5, he has also got information that Javed was in the company of the four accused persons, and so it is a hearsay evidence and is of no consequence.

10. Then the prosecution has examined P.W.16 Akbar Ali. This witness has deposed that on 26.10.1999 at about 6.30 p.m.when he was proceeding from Vengurla stand to the market, he saw all the accused standing at Vengurla Stand. He further deposed that Accused No.1 was proceeding on motorcycle towards market and he asked this witness whether he is proceeding towards market, and when this witness said yes, he gave lift to him to the market. He further deposed that on 27.10.1999, this witness had been to Banda on motor cycle in the morning and while returning from Banda, at about 1.00 p.m., he met accused No.3 near the police line at Sawantwadi. At that time, he saw an injury on the right wrist of the accused. From his cross-examination, it appears that on 27.10.1999, he had accompanied the brother of Javed at Amboli Ghat and was searching Javed as he had not returned home. He

further states that on 28.10.1999 also he had been to Amboli Ghat with other person and had seen the dead body of Javed. From his testimony, it appears that on 26.10.1999 at 6.30 p.m., all the accused were at Vengurla S.T.Stand and that the accused No.1 and this witness came to the market at about 6.30 p.m. It is pertinent to note that this witness has not deposed that the deceased was in the company of the accused. On the contrary, his testimony takes away accused no.1 to the market, dis-associating accused no.1 from the deceased.

11. The evidence of P.W.13 Numan Usman Aga shows that at 4 to 4.30 p.m., he had been to the weekly bazaar and he paid the amount of Rs.6900/- to Javed. Thus, the presence of the deceased Javed is tried to be established, but his evidence does not lead us any further.

12. Then the prosecution has led the evidence of P.W.15, Sarfaraj Khaja, who is the person in whose house accused No.2 was earlier residing as a tenant, and accused no.3 and accused no.1 are residing in the same wada. He has deposed that on 26.10.1999 at about 7.00 p.m., he was proceeding towards Ajra and when he came to Gavalititha (S.T.Stand), he missed the last bus

which was of 6.15 p.m., therefore he gave signal to Tata sumo which halted. When he was waiting near the tata sumo he had seen accused No.3 Bilal on the pillion seat of Yamaha Motorcycle which was proceeding towards Amboli Ghat. He further states that while the sumo was passing from Amboli Ghat, he saw two motor cycles in Amboli Ghat which were near the water fall. Accused No.3 Bilal and accused No.1 Abbas were near the water fall and two other fellows were near them, but he does not know the names of those persons. He has further deposed that on the next day ,he returned to Sawantwadi from Ajra. At about 12.30 p.m., Bakkar inquired with this witness about Abbas and Bilal. He stated that he had not seen them on that day, but he had seen them on the previous night at Amboli Ghat. He further states that at about 2.30 to 3.00 p.m., he had been to Sawantwadi bazaar. When he was near the shop of Mane, accused No.3 Bilal called him and enquired as to why he was searching for him. He told Bilal that he was not searching him, but Ramzan and Nasir were searching for him. This witness further states that he enquired with Bilal as to whether he was at Amboli Ghat on the last night. Bilal informed that he had taken liquor. He further states that the motorcycle which was seen by him at Gavali Titha was bearing No.GA-01/6790. From his cross-examination, it is seen that he had been

fined Rs.75/- for bringing beef to Sawantwadi. He has stated that when he was standing near the Sumo, a motorcycle passed by his side and the speed of the motorcycle was 30-35 k.m.p.h. and that he has seen the rider and the pillion rider of the said motor cycle from their backside while travelling in the sumo. He has also stated that he was sitting at the rear seat of the sumo. He has stated that he has seen the motor cycle at Amboli Ghat just for a second. He has further stated that he has identified the pillion rider on the motorcycle by the shirt on his person. There was no identification parade in respect of the said person. There was no identification parade held at all by the police persons. He has further admitted that he has not stated the make of the motorcycle when he made the statement before the police. From his evidence, it will have to be seen that this witness has seen accused No.3 at 7.00 p.m. at Gavali Titha because he had missed the last bus at 6.15 p.m. However, he does not say that the deceased was in his company at Gawalititha. It is further to be noted that even though he has stated that he knows the four accused persons, he has only identified accused Nos.1 and 3 at Amboli Ghat and he has not identified accused Nos.2 and 4 at Amboli Ghat. He only states that he had seen accused No.3 when he was sitting at Gavali Titha and

that too from the backside. Taking into consideration his testimony in the examination-in-chief and cross-examination, there is no doubt in our mind that this witness is not reliable witness because he has identified accused No.3 from the backside and that too by the shirt on his person, and hence the same cannot be taken to be proper identification of the accused. He had seen four persons at Amboli Ghat, and out of them he has identified only accused Nos.1 and 3 and has failed to identify accused Nos.2 and 4, is the circumstance against the prosecution because this witness knows all the four accused persons, and therefore he could have identified all the four accused at Amboli Ghat. He could not identify these persons at Amboli Ghat because it has come from the testimony of P.W.7 Ilyas that there was fog in Amboli Ghat and visibility was very poor. Above all even though he has stated that he has seen the four persons in the Amboli Ghat and out of them he identified accused Nos.1 and 3, yet he has not deposed that the deceased was in the company of these four persons.

13. All these witnesses are the witnesses on the point that the deceased was last seen with the accused persons. However, on proper analysis of the evidence of these witnesses it will be revealed that P.W.25 says

that he had seen the deceased with the accused at 6.00 p.m. at Gavali Titha. However, P.W.25 is not speaking anything about the rest of the accused being present at Gavali Titha. P.W.16, on the other hand, says that at 6.30p.m. he had seen all the four accused at Gavali Titha, but he is not saying anything about the presence of the deceased, and above all, this witness states that accused no.1 has given lift to him upto the market. Considering the evidence in its totality, what we find is that even though at 6.00 p.m. the deceased was in the company of accused no.1, but at 6.30 p.m. to 7 p.m., he was not in the company of the deceased. At 6.30 p.m. even though all the accused were at Gavali Titha, however the deceased was not there, therefore it appears that at about 6.30p.m. the deceased must have left, but the accused remained at Gavali Titha, and out of them P.W.16 and accused No.1. went to market, since accused no.1 gave lift to him. Therefore, we do not find that the prosecution has established the circumstances, namely, that deceased Javed was last seen together with the accused persons at Gavalititha at about 6.00 to 6.30 p.m. or even at Amboli Ghat at any time.

SUBSEQUENT CONDUCT OF THE ACCUSED.

14. The prosecution has brought on record evidence of P.W.Nos.8, 11, 12 and 17 to show the abnormal conduct of the accused persons after the commission of the offence. For this purpose, P.W.8 Hanumant Takkekar, who is a rickshaw driver, is examined. He has stated that on 26.10.1999, he had been to Gavalititha at night time and had parked the rickshaw at about 9.00 p.m. Accused No.2 Mubarak came at 10.00 p.m. on blue colour Yamaha make motor cycle. He parked the motor cycle by the side of the post office and sat in the rickshaw of P.W.8 and took the rickshaw towards the house of accused No.4.Manvel. This witness called accused no.4 from his house and the accused no.4 also sat in his rickshaw. The rickshaw was taken at Gawalititha. Accused no.4 was in the rickshaw and Mubarak had taken the motorcycle. Then the rickshaw was taken to Shivaji Statue, Ubha Bazaar, where the motorcycle was handed over by accused no.2 in one house and thereafter accused No.2 and accused No.4 have taken the rickshaw again to Gavali Titha and purchased a beer bottle. He further deposed that thereafter the accused asked him to take the rickshaw to Ladachi Bag Maidan. He left them at Ladachi Bag Maidan at 12.00p.m. and he was asked to come back at 12.15 midnight near Ladachi Bag Maidan and accordingly at 12.15 he has been to the said place. He further deposed that all the four

accused persons had gathered there and they sat in the rickshaw. At that time, accused Nos.1 and 2 were in frightened condition. Accused no.3 was in wet condition and he was also frightened. He had injury on his right palm. He then took these four persons to Majgaon Nala. He further deposed that on 27.10.1999 he came to Majgaon Nala at 7.15 a.m. and brought accused Nos.1, 2 and 4 to Sawantwadi and they alighted at different places in Sawantwadi.

15. P.W.11 Nitin Patil, who is another rickshaw driver-cum-owner of the rickshaw, has deposed that on 27.10.1999 at about 3.00 p.m. he took his rickshaw at Vengurla Stand and there he had taken some passengers to Bazaar at 6.00 p.m., and while he was returning from the bazaar he met P.W.8 with his rickshaw near Renuka Hotel. Accused No.4 was in the said rickshaw. He asked this witness to take the rickshaw to the house of accused no.4. Therefter P.W.8 had gone away. Accused No.4 gave Rs.350/- to this witness and asked him to purchase a blue coloured jean from the bazaar. Accordingly, he purchased the jean and handed it over to accused No.4. He further states that on 28.10.1999 at about 6.00 to 6.30 a.m. when he was sleeping at his house, accused no.4 came to his house and asked him to take him to Reddy by his rickshaw. Accordingly, P.W.11

has taken him to Reddy and then to Terekhol. Thereafter accused No.4 asked him to keep the rickshaw at Terekhol and asked him to accompany to Panaji. Then both of them proceeded to Panaji on motor cycle. When this witness demanded the amount of rickshaw-fare, accused No.4 told him that he shall accompany him to Belgaum and then only he will pay the rickshaw fare. Therefore, he accompanied him to Belgaom by Karnataka bus and reached Belgaum at 5.15 p.m. At that point, the accused No.4 first stood at a Wada pav stall and asked this witness to find out whether accused Nos. 1 to 3 had come there. The witness found accused Nos.1 to 3 at the S.T. stand. Accused No.2 and accused No.4 paid the amount of Rs.400/- and then all accused purchased tickets and went towards private bus near killa. The bus was of Hyderabad. This witness in his cross examination has admitted that he was arrested by the police in connection with same crime and was kept in the custody. He has admitted that he went to Reddy and then to Terekhol and parked his rickshaw near a shop at Terekhol and then he states hat he went by a steamer to a village and then went to Panjim. He is unable to give the name of the person with whom the rickshaw was kept at Terekhol. It is further to be noted that this witness returned from Belgaum to Sawantwadi and did not bother to take the rickshaw.

The rickshaw was brought by the police after his arrest. What we find is that this witness is also not believable witness in the sense that in the examination-in-chief, he has not stated that they had travelled by steamer which is reflected in the cross-examination. Above all, if he is the owner of the rickshaw, then in that circumstances he would not have left the rickshaw at Terekhol with an unknown person as he is the owner of the vehicle. After he had left the accused at Belgaum, he would have directly returned to Terekhol to take back his rickshaw. On the contrary, it appears that he directly went to Sawantwadi and the rickshaw was brought in investigation. Therefore, from the discrepancies in his testimony, we are not inclined to accept his testimony.

16. The prosecution has also examined P.W.17 Amar Kalagatti. He is the proprietor of Arvind Lodge, situated at Belgaum. He has deposed that on 29.10.1999, Sawantwadi Police had been to him and they showed two photographs and enquired as to whether these persons have stayed in the lodge, upon which this witness has disclosed to the police that two persons had been to his lodge on 28.10.1999 at about 1.00p.m. and left by 5.00 p.m. One of them had given the name

as Rafik Maula. Rafik Maula had come to take the room and thereafter the other person came and stayed. He stated that accused Nos.1 and 2 are the same persons whose photo was shown to him by the police and he identified accused Nos.1 and 2. It transpires from his evidence that he has not brought the register of lodge in the Court. Not only that, but the police have also not taken the extract of the said register or seized the said register. He has admitted that he would not say how many passengers had been to his lodge on 28.10.1999 without referring to the register. He has further admitted that he could not give the names of the persons who were in the lodge on 28.10.1999 without referring to the register. He has further admitted that there was no identification parade held by the police. Thus his evidence shows that on 28.10.1999, accused Nos.1 and 2 have stayed in his lodge in between 1.00 p.m. to 5 p.m. on fictitious names. The manner in which the investigation is carried i.e. by showing the photographs and carrying out identification of the accused, is not proper. The entry in the register is in the name of Rafik Maula and it was necessary for the prosecution to establish that Rafik Maula and accused No.1, or accused No.2 are one and the same person. Because it is not disclosed from his evidence who had come to his lodge first and who came lateron. He has

only deposed that one person had come and given the name as Rafiq Maula and the other person came thereafter. Out of the two accused, it is not known as to who has given the name as Rafik Maula, and further in order to establish the identification of the person nor identification parade was held, which was very much necessary. Therefore, we find that the evidence of P.W.7 is of no help to the prosecution and is inconsequential.

17. The prosecution has examined P.W.12 Arvind Narvekar. He is also an owner of rickshaw, and resident of Amboli Bazaar. He has deposed that he is keeping petrol and sometimes used to give the said petrol to needy persons. He stated that on 26.10.1999 at about 8.30 p.m. while he was in his house, one boy came to him demanding petrol, and therefore, he gave two litres of petrol, whereupon the said boy handed over a currency note of Rs.100/- and assured that the rest of the money and the bottle will be returned afterwards, but thereafter he did not return. He has stated that the police had brought two boys. Out of them, he identified accused No.2 before the Court as the person who had taken the petrol. He surrendered the amount of Rs.36/- to the police. In his cross-examination, he has admitted that the accused had

not brought car or motor-cycle with him when he had come for taking petrol. It is suggested to this witness that the police had not brought the two boys, but had shown him accused no.2 on the day when the evidence was recorded. He has admitted that identification parade was not held and that he had not given the description of the boy to the police. This shows that accused No.2 was not known to this witness and, for the first time, they had transaction of petrol. Under these circumstances, the identification parade was very much necessary, which the police have not conducted. It is further to be noted that from Exhibit 38, which is panchamama in respect of seizure of the amount of Rs.36/-, it is revealed that only one person was brought by the police to the witness No.12 and therefore, the story which he has made out before the Court that the police had brought two persons and out of them he identified one person is contrary to the investigation record. We, therefore, reject the testimony of this witness.

18. Reading the testimony of P.W.Nos.8, 11, 17 and 12, whose evidence has been led by the prosecution to show that after the incident the accused were in frightened condition, and that initially they had all gathered at Ladachi Bag, consumed beer and thereafter

they dispersed cannot be believed. It is further shown that the accused Nos.4 had gone to Reddy, from Reddy to Terekhol and from Terekhol to Panaji, and then he met rest of the accused at Belgaum and from there they went to Hyderabad. There is no evidence brought on record to show as to in what manner the accused Nos.1 to 3 travelled to Belgaum. Further, this travelling itself is not an incriminating circumstance, and since we have already commented on each of the witness, we find that the prosecution has not established the conduct inconsistent with the innocence of accused Nos.1 to 4 conclusively or to make out any clinching circumstance to infer the guilt of the accused.

DISCOVERIES FROM THE ACCUSED.

19. The Accused No.1 was arrested on 22.11.1999 and the arrest panchanama is at Exhibit 29. He was arrested at about 3.45 a.m. on the said date and time. On the same day, accused No.1 had shown willingness to produce the clothes which were on their person at the time of committing the offence and which were blood stained and which were burnt and thrown in the Municipal dustbin. Therefore, the memorandum was prepared at about 13.15 hrs. The panch was P.W.3 Rajan Shringare. Thereafter the panchanama, Exhibit 31, was

prepared. According to the prosecution, the police and the panch and the accused went near the dustbin situated at Kupral Naka. He pointed out the spot and the burnt pieces of the clothes and the ash was found and one piece of chain was also found. These were the articles 46 to 54 which were attached under panchanama at Exhibit 31.

20. This discovery of the burnt clothes and ash etc, is prima facie no discovery because the place from where the clothes and ash was seized is a Municipal dustbin, and that too it has been seized on 22.11.1999, whereas, the offence is committed on 26.10.1999. It is highly improbable that for such a long period the Municipal Dustbin is unattended by the municipal employees. It is equally open place and accessible to any one and therefore the said discovery is not a discovery within the meaning of Section 27 and hence we disbelieve the same.

21. Accused No.2 was arrested on 24.11.1999 at about 5.10 p.m. He showed his willingness to the police in presence of P.W.3 to show the spot where the slipper was concealed, and therefore, the memorandum, Exhibit 36, was prepared and thereafter the accused had led the police and the witness to Amboli Ghat to

produce one slipper. The panchanama in respect of this is at Exhibit 37. It is to be noted that the memorandum exhibit 36 was prepared on 29.11.1999 at about 11.15 to 11.30 and the panchanama Exhibit 37 started at 11.30. The place at which the said panchanama is made is in Amboli Ghat at Mile No.23. It has come in evidence that for crossing such a distance, one hour is required. However, on reading these two documents it is revealed that within period of five minutes, the accused have taken the police and panchas to the spot and the panchanama in respect of discovery started. This shows that the panchanama must not have been prepared at the spot, but it must have been prepared at the police station itself. The slipper must have been already recovered by the police, and it has been tried to be implanted as discovery. Otherwise, it is very much impossible to cover up such a distance within five minutes and prepare the panchanama. Therefore, it raises doubt about the genuineness of the said panchanama.

22. The accused No.3 was arrested on 24.11.1999 at about 5.40 a.m. and he has shown willingness on 26.11.1999 to show the spot where the knife had been thrown in the valley in Amboli Ghat. This memorandum was prepared at 11.00 to 11.15 a.m. The discovery

panchanama of the spot which was shown by accused No.3 started immediately within five minutes i.e. 11.15 to 12.20, whereas as already stated, the distance which is to be covered is 30 kms and it requires driving time of one hour. We find that from the said place the knife has been seized by the police. It is further to be pointed out that the knife has not been produced by the accused when went to the spot, but it is the police who have found the knife. The Sessions Judge has commented that it cannot be believed that the knife was discovered from an open place. Looking to the panchanama, we are also not ready to believe that this recovery is free from suspicion.

23. It is further to be noted that these memorandum and discovery panchanamas, namely Exhibits 30, 31, 34, 35, 36 and 37 in respect of accused Nos.1 to 3, have been prepared in the presence of one panch, namely Rajan Shringare, P.W.3. Apart from that, Rajan Shringare is the panch to Exhibit 29, Exhibit 32, Exhibit 33 and Exhibit 41. All these panchanamas are the arrest panchanamas of the accused persons. He is also the panch to Exhibit 38 wherein cash was produced by P.W.12 before the police. Thus, from Exhibit 29 to 41, P.W.3 is the only witness. If we look to the cross examination of P.W.3, it will be revealed that he is an

habitual witness. He has admitted that he was a panch in a murder case of one Mr. Bagwan. He has also acted as panch in a theft case against accused Nos.1 and 2 and he has further admitted that he has acted as panch in many cases. This admission of the witness show that this witness is habitual witness of the police. Therefore, we discard his testimony. In the result, we discard the evidence of the prosecution as reflected from Exhibits 29 to 41, some of the exhibits we have discussed above. Rest of the exhibits namely, Exhibits 29, 32, 33 and 41 are in respect of the arrest panchanama and the articles which were found on the person of the accused when they were arrested. However, since P.W.3 is a habitual panch, we discard those panchanamas to the extent of the seizure made from the person of the accused.

24. P.W.4, Pandurang Naik, is the panch witness who has proved the panchanama Exhibit 43, Exhibit 44 and Exhibit 45. Exhibit 43 is the panchanama in respect of clothes and articles of the deceased which were produced by the constable after the postmortem. Exhibit 44 is the panchanama of the handle of motorcycle which was already attached by the police under panchanama, Exhibit 24, on 28.10.1999. This was in the custody of the police and the handle of the said

motorcycle is seized by the police under panchanama, exhibit 44, on 4.12.1999. Exhibit 45 is panchanama of clothes of the accused Nos.2 and 3, taken in possession by the police. In fact accused No.2 and accused No.3 were arrested on 24.11.1999 by the arrest panchanama, exhibit 33, and if the clothes were according to the prosecution incriminating they should have been taken under panchanama at the same time when the arrest panchanama was prepared. However, the clothes of accused No.2 and 3 were not taken in possession at the time of arrest and they were taken into posession on 4.12.1999 which was an unwarranted exercise by the Investigating Officer. Atleast, we are unable to follow as to why the clothes of Accused Nos.2 and 3 were taken into custody on 4.12.1999. It is further to be noted that the seizure of the motorcycle handle on 4.12.1999 when the motorcycle was already in the custody of the police as the circumstance against the prosecution and we do not believe the said circumstance.

CHEMICAL ANALYSER'S REPORT.

21. The Chemical Analyser's report is at Exhibit 80, which shows that except Articles 9, 10, 11, 17, 19, 20 and 29 all other articles are having no human blood.

It is further disclosed that Article Nos.2, 7, 12, 15 and 16 are having "A" group blood. In respect of all other articles, the blood group is inconclusive. Since we have disbelieved all the discoveries and the seizure made under the arrest panchanama, so far as the accused persons are concerned, the Chemical Analyser's report loses its importance. The C.A. Report is an attempt to co-relate the articles which were found from the spot or from the accused persons and that the blood group of both is one and the same, but since we have disbelieved the seizure, and also discovery panchanama, the Chemical Analyser's report at Exhibit 80 is of no consequence and of no help to the prosecution. No doubt, from the evidence it appears that the incident is dated 26.10.1999. As against that the accused No.1 was arrested on 22.11.1999. Accused Nos.2 and 3 are arrested on 24.11.1999 and accused No.4 was arrested on 13.3.2000. This material shows that the accused were absconding , however, from the above discussion, it will be revealed that all the other circumstances, have not been believed by us and we have discarded that evidence and thereby only one circumstance, namely, the absence of the accused cannot be incriminating circumstance as against the accused. Since the trial Court has already recorded the finding of acquittal in respect of 395 and 397, thereby the only inference for

us is that there was no motive for the offence. In the result, we find that the prosecution has failed to prove the guilt of the accused beyond reasonable doubt. We, therefore, are inclined to acquit the accused by giving them benefit of doubt. Therefore, the following order :

O R D E R

1. The Appeal is allowed.

2. The order of conviction and sentence passed against the Accused Nos.1 to 4 for the offences punishable under section 302, 201 r/w.34 of I.P.C. is hereby set aside.

3. The accused Nos. 1 to 4 are acquitted of the offences punishable under section 302, 201 r/w.34 I.P.C.

4. The amount of fine, if deposited be returned to the respective accused after the period of appeal is over and in case of appeal, subject to the decision.

5. The accused are set at liberty, if not required in any other case.

4. Smt. Revati Mohite-Dere is appointed for conducting the matter on behalf of accused Nos.1 and 2. Since valuable service is rendered by her in conducting this matter, we quantify her fees at Rs.2000/- (Rupees Two Thousand Only)

(S.R.SATHE, J.) (S.B.MHASE,J.)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

Criminal Appeal No.188 of 2001.

1. Jahir Abbas Appasab Bagvan
2. Mubarak Shamsher Ali Khan
3. Bilal Mahommaed Alli Khatib
4. Manvel Fasku D'Souza ..Appellants/

(Original Accused Nos.1 to 4)

Versus

State of Maharashtra ..Respondent

Smt. Varsha Palav for the appellant nos.3 and 4

Smt. Revati Mhoite-Dere for Appellant Nos.1 & 2

Dr.F.R.Shaikh, APP for the respondent- State

CORAM: S.B.MHASE &

S.R.SATHE, JJ.

DATE : 28th Sept, 2005

Final Order

For the reasons recorded separately, the Court passes the following order :

The Appeal is allowed.

2. The order of conviction and sentence passed against the Acused Nos.1 to 4 for the offences punishable under section 302, 201 r/w.34 of I.P.C. is hereby set aside.

3. The accused Nos. 1 to 4 are acquitted of the offences punishable under section 302, 201 r/w.34 I.P.C.

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conducting the matter on behalf of accused Nos.1 and 2. Since valuable service is rendered by her in conducting this matter, we quantify her fees at Rs.2000/- (Rupees Two Thousand Only)

(S.R.SATHE, J.) (S.B.MHASE,J.)